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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	91208003
Party	Plaintiff Red Bull GmbH
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Attachments	Michael Ball RED Applns-91208003-Mtn to Strike.pdf (6 pages)(25637 bytes)

**CERTIFICATE OF ELECTRONIC FILING AND
STANDBY AUTHORIZATION TO CHARGE DEPOSIT ACCOUNT**

I hereby certify that this Motion to Strike is being filed with the TTAB via ESTTA on the date set forth below.
Date: January 18, 2013 /Leah Z. Halpert/
Leah Z. Halpert

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

RED BULL GMBH,	)	Opposition No.: 91-208,003
)	
Opposer	)	Serial Nos.: 85/400,933
v.	)	85/400,941
	)	85/400,955
	)	85/406,652
	)	Trademarks:
MICHAEL F. BALL,	)	+RED DETOX ELIXIR (#85/400,933)
	)	+RED DREAM ELIXIR (#85/400,941)
Applicant.	)	+RED SUN REPAIR ELIXIR
	)	(#85/400,955)
	)	+RED RESCUE ELIXIR (#85/406,652)

OPPOSER’S MOTION TO STRIKE APPLICANT’S AFFIRMATIVE DEFENSES

Pursuant to Rule 12 of the Federal Rules of Civil Procedure (“Fed. R. Civ. P.”) and § 506.01 of the Trademark Trial and Appeal Board Manual of Procedure (“TBMP”), Opposer, RED BULL GMBH (“Red Bull” or “Opposer”) hereby moves the Trademark Trial and Appeal Board (the “Board”) to strike Applicant’s first, second, third, and fifth affirmative defenses as pleaded in Applicant’s Answer and Affirmative Defenses (“Answer”) filed by MICHAEL F. BALL (“Applicant”) as they are redundant, legally insufficient and improper as a matter of law.

ARGUMENT – GENERAL

Under TBMP § 506.01, “the Board may order stricken from a pleading any insufficient defense or any redundant, immaterial, impertinent or scandalous matter.” *See* Fed. R. Civ. P. 12(f); *See also Harsco Corp. v. Electrical Sciences Inc.*, 9, USPQ2d 1570 (TTAB 1988). Although motions to strike are not favored, *Id.*, they are permissible and will be granted when appropriate, *Id.* – such as the case is here. Here, as purported affirmative defenses 1, 2, 3, and 5 are all either merely redundant of the denials set forth in the answer without adding anything

new, or legally insufficient and/or improper, it is appropriate for each of these four defenses to be stricken prior to the parties expending their time – and the Board’s time – on unnecessary discovery, testimony, argument and briefing.

A. Applicant’s First “Affirmative Defense” Should be Stricken as Legally Insufficient.

Applicant’s first “affirmative defenses” baldly states:

Opposer’s allegation of fame in numbered paragraph 7 of the Notice of Opposition fails to state a claim upon which relief can be granted.

As an initial matter, this type of bare bones conclusory assertion has been consistently held by the TTAB to be legally insufficient, as it does not provide Opposer with even a modicum of detail or any fair notice as to the basis for the “defense”. *IdeasOne Inc. v. Nationwide Better Health Inc.*, 89 USPQ2d 1952, 1953 (TTAB 2009); *Fair Indigo LLC v. Style Conscience*, 85 USPQ2d 1536, 1538 (TTAB 2007); *Ohio State University v. Ohio University*, 51 USPQ2d 1289, 1293 (TTAB 1999) (the primary purpose of pleading is to give fair notice of the claims or defenses asserted); Fed. R. Civ. P. 8(d); TBMP § 311.02(b) (although a defense should be stated simply, concisely and directly, the pleading must include enough detail to give plaintiff fair notice of the basis for the defense). Here, Opposer is left without any specifics regarding how or why Applicant believes the allegation of fame – a supportive allegation further elucidating Opposer’s likelihood of confusion case, and not a ground in and of itself – is insufficient. The Board has held, as it should here, that such a bare, conclusory statement fails to properly notify Opposer of any specific issues within the Notice of Opposition, and as such, Applicant’s first “affirmative defense” is legally insufficient and should be stricken.

Notwithstanding the fact that Applicant’s first affirmative defense is legally insufficient on its face, but it is also illogical as “fame” is not a basis for an opposition – rather, it is alleged in order to provide the defendant fuller notice of the plaintiff’s claims and how the plaintiff plans on proving its case. Just like defenses, pleadings must also provide enough detail to provide the defendant fair notice of the basis for each claim. *See Bell Atlantic Corp. v. Twombly*, 550 U.S.

554, 570 (2007); *Fair Indigo LLC, supra*; TBMP § 309.03(a)(2). While a mere allegation of fame in a vacuum simply cannot form a complete ground upon which relief can be granted, when read in conjunction with the rest of Opposer’s Notice of Opposition, it is clear that the paragraph 7 allegation permissibly provides Applicant with fuller notice of Opposer’s likelihood of confusion claim.

As Applicant’s first affirmative defense is legally insufficient and illogical, it should be stricken.

B. Applicant’s Second Affirmative Defense is a Not a Defense and is a Misstatement of the Law and Should be Stricken.

Applicant’s second affirmative defense states:

Opposer fails to identify the federal trademark registrations that form the basis of its Notice of Opposition in numbered paragraph 3. The Notice of Opposition thus lacks the requisite definiteness for Applicant to form a definitive belief about the allegations therein.

Applicant’s second affirmative defense is not a defense at all. An affirmative defense is one that assumes all the allegations in a complaint to be true and then goes on to assert new matter that eliminates or limits the defendant’s ordinary liability stemming from those allegations. *Amanda Blackhorse, Marcus Briggs, Phillip Glover, Jillian Pappan, and Courtney Tsotigh v. Pro Football, Inc.*, 98 USPQ2d 1633 (TTAB 2011); *See Black’s Law Dictionary* 451 (8th ed. 2004). Such a defense does not negate the elements of the cause of action, but rather provides an explanation that bars the claim entirely. *Id.* Here, even if Applicant’s assertion in its second “affirmative defense” were correct law – which it is not as explained further below – Applicant is claiming that it cannot admit or deny any of the allegations in the Notice of Opposition due to a lack of definiteness. In order to be an affirmative defense, this allegation would necessarily need to prevent the Board from finding likelihood of confusion, as asserted in the Notice of Opposition, even if all of Opposer’s assertions were taken to be true. Rather, Applicant’s second “affirmative defense” is more akin to a plea for a more definite statement – something which, as

explained below, would be futile, and clearly not required by Applicant's own actions. Had Applicant really found the Notice of Opposition to be so vague or ambiguous that it could not reasonably prepare a response – clearly not the case, as Applicant has, in fact, fully answered the entire Notice of Opposition – the proper course of action is not an affirmative defense that will not be tested until trial, but rather a Motion for a More Definite Statement. *See* TBMP § 505.

Even if Applicant filed a Motion for More Definite Statement, such a motion would be futile, as Applicant's second affirmative defense is a misstatement of the law, and should be stricken as such. Applicant asserts that Opposer must base an opposition on specifically identified federal trademark registrations, else the opposition is indefinite. However, according to clear trademark law, a likelihood of confusion claim – the sole claim in the instant opposition – can be based on a plaintiff's federally registered trademark *or a mark or trade name previously used in the United States and not abandoned*. Trademark Act § 2(d), 15 U.S.C. §1052(d); TBMP § 309.03(c). Here, Opposer has specifically defined the basis of the opposition as its prior used registrations and common law rights for the trademarks RED, RED BULL and other marks for or incorporating the words RED and RED BULL for various goods and service, Notice of Opposition ¶¶ 3-4, giving Applicant clear, fair notice of the specific trademarks upon which this opposition is based.

As Applicant's second "affirmative defense" is improper as a defense and a misstatement of clear trademark law, it should be stricken.

C. Applicant's Third and Fifth Affirmative Defenses are Merely Redundant of Prior Denials Set Forth in the Answer and Should be Stricken.

Applicant's third and fifth affirmative defenses are as follows:

Opposer has not and will not suffer any damage from the registration of Applicant's marks opposed in this proceeding. Affirmative Defense 3, Answer at 3.

Applicant's opposed marks and Opposer's Marks are so different in sound, appearance, meaning, connotation and commercial impression that their use in connection with Applicant's and Opposer's respective goods and services cannot

result in a likelihood of confusion, mistake or deception within the meaning of the Lanham Act, the common law, or any other applicable legal authority. Affirmative Defense 5, Answer at 4.

The Fed. R. Civ. P. are clear that the Board may strike any redundant, superfluous material. Fed. R. Civ. P. 12(f); TBMP § 506.01. Case law further clarifies that mere reiterations of denials that were previously set forth in the answer and do not add anything of substance – such as Applicant’s third and fifth affirmative defenses – are redundant and should be stricken as such. *Textron, Inc. v. The Gillette Company*, 180 USPQ 152, 154 (TTAB 1973). Here, the third and fifth affirmative defenses are merely conclusory repetitions of the Applicant’s exact denials stated earlier in the Answer, without providing any amplification or further reason behind the conclusions, or providing Opposer with any further information about Applicant’s defenses or case.

The Board distinguishes between mere reiterations which should be stricken – such as those found in Applicant’s third and fifth affirmative defenses – and allowable amplifications that serve to give the plaintiff fuller notice of how the defendant plans to defend its right to registration. *See Morgan Creek Productions, Inc. v. Foria Int’l. Inc.*, 91 USPQ2d 1134, 1136 (TTAB 2009); *Humana, Inc. v. Humanomics Inc.*, 3 USPQ2d 1696, 1697 n.5 (TTAB 1987); *Maytag Co. v. Luskin’s, Inc.*, 228 USPQ 747, 747 n.3 (TTAB 1986). In order to constitute an allowable amplification, the Board has consistently held that the “defense” must include additional facts to support the defendant’s position, else the “defense” is merely redundant and must be stricken as such. Here, however, no such additional facts exist. Applicant’s third affirmative defense merely repeats Applicant’s denial shown in the preamble of the Answer,¹ and Applicant’s fifth affirmative defense, merely reiterates the bare bones denial of paragraph 14 of the Notice of Opposition.² Neither “defense” add anything to further elucidate Applicant’s

¹ The preamble of the Answer states: “Applicant denies that Red Bull GmbH (“Opposer”) will be damaged by the registration of its marks . . .”

² Paragraph 14 of the Notice of Opposition states: “Applicant’s Opposed Marks so resemble Opposer Red Bull’s RED and RED BULL Marks as to be likely, when applied to the goods of Applicant’s Appln. Nos. 85/400,933,

position or put Opposer on fuller notice. As such, Applicant's third and fifth affirmative defenses are mere reiterations of the denials in the Answer and should be stricken as redundant.

Conclusion

For the foregoing reasons, Opposer respectfully requests that Applicant's first, second, third, and fifth affirmative defenses as seen in the Answer be stricken.

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Dated: January 18, 2013

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **OPPOSER'S MOTION TO STRIKE APPLICANT'S AFFIRMATIVE DEFENSES** is being served on January 18, 2013, by deposit of same in the United States Mail, first class postage prepaid, in an envelope addressed to Applicant's Counsel at their Correspondent address given on the TARR website, with a courtesy copy via email to cwcdocketing@roylance.com.

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85/400,941, 85/400,955, and 85/406,652, to cause confusion, mistake or deception among purchasers, users, and the public, thereby damaging Red Bull", to which Applicant simply responded "Denied".